

D.P.U. 93-124-A

Petition of Town of Stow for an Advisory Ruling, pursuant to the provisions of 220 C.M.R. 2.08, concerning the application of G.L. c. 164, §§ 42 and 43 to the Town of Stow and to the Hudson Light and Power Department.

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I. INTRODUCTION

On June 30, 1993, pursuant to 220 C.M.R. 2.08, the Town of Stow ("Stow") filed with the Department of Public Utilities ("Department") a Petition for an Advisory Ruling ("Petition") that severance damages, as that term is used in G.L. c. 164, § 43, and incorporated by reference into St. 1898, c. 143, exclude consequential and economic damages relating to wholesale purchase power contracts and other contractual relationships relating to the ownership or purchase of electric generation. In its Petition, Stow requested that it and any other interested parties be permitted to submit briefs on the merits of the requested ruling without holding evidentiary hearings.

Statute of 1898, c. 143, provides, in part, that Stow may establish its own municipal light plant by passing two town meeting votes to that effect in no more than thirteen months' time. Stow is currently provided electric service by Hudson Light and Power Department ("HL&PD"). Stow passed its initial town meeting vote to establish its own municipal light plant on May 4, 1993. The second vote must be taken by June 4, 1994.

General Laws, c. 164, § 43 provides inter alia, that if parties cannot agree as to the price or the property to be included in the purchase within 150 days of the passage of the final town meeting vote, either party may apply to the Department within 30 days of the expiration of said 150 days for a determination by the Department. General Laws c. 164, § 43 also provides that such price shall include damages, if any, which the

Department finds would be caused by the severance to the property proposed to be included in the purchase from other property of the owner.

The Hudson Light and Power Department ("HL&PD") filed a Motion to Dismiss Stow's Petition ("Motion to Dismiss"). On July 29, 1993, Stow filed with the Department a Response to HL&PD's Motion to Dismiss. On August 4, 1993, HL&PD filed a Rejoinder to Stow's Response to the Motion to Dismiss.

On August 27, 1993, the hearing officer issued a memorandum ("Hearing Officer's Memorandum") granting Stow's request to submit briefs, and establishing a deadline of September 24, 1993 for the submission of the briefs!^{1,2}

On September 7, 1993, HL&PD filed a Motion for Hearing of its Motion to Dismiss the Request for an Advisory Ruling ("Motion for Hearing"), and a Motion to Stay the Briefing Period Order pending a ruling on the Motion to Dismiss ("Motion to Stay"). On

¹ On August 27, 1993, the hearing officer also notified the Office of the Attorney General, the Littleton Light and Water Department, Massachusetts Electric Company, the Town of Hudson, and Rubin and Rudman, a law firm that had requested to be notified of this proceeding, of the briefing schedule.

² The Hearing Officer's Memorandum provided that the scope of the briefs be limited to the issues of: (1) whether severance damages, as contemplated in G.L. c. 164, §43, include compensation for consequential and economic damages relating to wholesale purchase power contracts or any other contractual relationships relating to the ownership or purchase of electrical generation; and (2) whether severance damages are adequately contemplated and addressed in power purchase or other agreements (Hearing Officer's Memorandum at 2).

September 14, 1993, Stow filed a Response to HL&PD's Motion for Hearing, and Motion to Stay.

On September 28, 1993, the hearing officer issued a ruling denying HL&PD's Motion to Stay ("Ruling"). The Ruling stated, inter alia, that since Stow and HL&PD will be affected by the Department's disposition of Stow's Petition, initial arguments in the form of briefs from Stow and HL&PD are essential to the Department's inquiry (Ruling at 4).

On November 29, 1993, the Department issued an order denying the appeal of HL&PD of the hearing officer's ruling denying HL&PD's Motion to Stay pending a ruling on HL&PD's Motion to Dismiss. Town of Stow, D.P.U. 93-124 (1993). The Department also indicated that it would defer ruling on the Motion to Dismiss until such time as it issued an order on the Petition.

Id. at 3.³

Stow, the Reading Municipal Light Department ("RMLD") and the Massachusetts Municipal Wholesale Electric Company ("MMWEC") filed briefs in this matter. HL&PD did not submit a brief.

II. MOTION TO DISMISS

A. Positions of HL&PD and Stow

1. HL&PD

HL&PD moves that the Department dismiss Stow's Petition. As grounds therefor, HL&PD asserts that no justiciable controversy can exist until Stow has taken its second vote

³ By taking this action, the Department effectively denied HL&PD's Motion for Hearing.

(Motion to Dismiss at 1). HL&PD argues that, until such time as a second vote is taken by Stow, and HL&PD and Stow fail to agree on the price and property to be included in the purchase, there is no dispute before the Department under the provisions of G.L. c. 164, § 43 (id. at 1,2).

2. Stow

In response to HL&PD's claim that no justiciable controversy exists, Stow maintains that HL&PD's argument fails for two reasons. First, Stow argues that by mailing materials to Stow voters and ratepayers which state that Stow is liable for contract severance damages, HL&PD has undertaken action to influence Stow voters and ratepayers, thereby creating a controversy (Stow Response at 1,2). Stow also argues that the Department should resolve HL&PD's claims in order that all parties can ascertain the costs and benefits of the proposed takeover and can take rational action in light of a determination by the Department of its interpretation of the relevant law (id.).

Second, Stow contends that its obligation to buy and HL&PD's obligation to sell, may become irreversible after Stow takes its second vote and, therefore, there is a dispute that is ripe and justiciable (id.).

B. Standard of Review

The Department regulation at 220 C.M.R. § 1 .06 (6)(e) allows for a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial

pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is applicable to the instant Motion to Dismiss and Motion for Hearing of the Motion to Dismiss.

In Riverside Steam & Electric Company D.P.U. 89-123, at 26-27 (1988), the Department denied the respondent's motion to dismiss, finding that it did not "appear[] beyond doubt that [the petitioner] could prove no set of facts in support of its petition," and, in doing so, adopted the traditional Rule 12(b)(6) civil standard. Id., see Mass. R. Civ. P. Rule 12(b)(6); see also Nader v. Citron, 372 Mass. 96, 98 (1988).

In making its determination on whether to grant a motion to dismiss, the Department in reviewing the filing and pleadings must take the facts included in the filing and pleadings as true and viewed most favorably to the non-moving party.Id.

C. Analysis and Findings

Stow asserts that, in circulating its position that purchase power contract costs are included in severance damages, HL&PD has generated a controversy. HL&PD, in fact, has acknowledged that Stow's position on the potential cost of severance damages is at "substantial variance" with HL&PD's position (HL&PD Appeal of Hearing Officer Ruling at 2). Therefore, the Department finds that there is a controversy, and accordingly, the Department finds that HL&PD has failed to sustain its burden of affirmatively demonstrating that it appears to a certainty that Stow is not entitled to obtain an advisory ruling under any set

of facts which could be proved in support of its Petition.

Accordingly, for the foregoing reasons, the Department denies HL&PD's Motion to Dismiss.

III. REQUEST FOR ADVISORY RULING

A. Position of Commenters

1. Stow

Stow contends that severance damages, pursuant to G.L. c. 164, §§ 42 and 43, do not include wholesale power contract liabilities incurred by HL&PD (Stow Brief at 4). Stow maintains that damage for severance is limited to damages resulting from the physical severance of the plant, such as costs of relocation of poles, conductors, and transformers^{id.} at 7). In support of its position, Stow advances three principal arguments: (1) the Legislature did not intend to include contract liabilities, and other intangible costs in the purchase price of the plant; (2) case law in eminent domain proceedings likewise precludes recovery for this type of loss; and (3) HL&PD could have avoided these costs by negotiating conditional wholesale power contracts or obtaining Stow's assurance for continued power purchase from HL&PD.

Stow maintains that "severance" as known to the Legislature in 1891 denoted a separation or physical division^{id.} at 19). Stow also contends that the plain wording of St. 1898, c. 143, the special statute under which HL&PD serves Stow, is limited to tangible property, and intangible rights such as contract liabilities were not contemplated for inclusion in the purchase

price (id. at 6, 10). Moreover, Stow maintains that the language of G.L. c. 164, § 43 likewise restricts recovery to damages resulting from the physical severance of the plantid. at 7).

Stow further argues that the statutory scheme affirmatively excludes as severance damages the wholesale power contract liabilities incurred by HL&PD (id. at 15). Stow bases its argument on the prohibition in G.L. c. 164, § 43 against including "future earning capacity" and "good will" and "privileges derived from rights in the public ways" in the consideration of the price of the plant (id.). Stow maintains that these terms are synonymous with terms such as value of sales revenues and contract liabilities (id. at 16). Thus, Stow argues G.L. c. 164, § 43 squarely precludes lost sales revenues, and resulting increased wholesale contract liabilities from being included in the purchase price (id.).

Stow also argues that eminent domain precedent establishes that recovery is limited to the diminution in value of property directly and proximately resulting from the taking, and does not include consequential business losses resulting from loss of sales (id. at 22). Stow notes that in a case similar to the current proceeding, the court rejected the claimed damages as being too speculative and remote (id. at 27-28, citing Arizona Water Co. v. City of Yuma 7 Ariz. App. 53, 436 P.2d 147 (1968)).

Stow further asserts that HL&PD's contract liabilities should not be included in the price of the plant because HL&PD

could have avoided or at least minimized the risk of loss (id. at 32). Stow maintains that HL&PD could have negotiated wholesale power contracts contingent upon Stow's affiliation with the system (id.). In addition, Stow contends that HL&PD could have contracted with Stow to protect against departure from the system or to guarantee a portion of the contracts (id. at 33).

2. RMLD

RMLD contends that severance damages, pursuant to G.L. c. 164, § 43, include power supply commitment costs (RMLD Brief at 3). RMLD argues that compensation for power supply-related severance damages is consistent with legislative history and Department policy (id. at 3-4). RMLD states that there are two types of severance damages, physical severance damages and economic severance damages, and asserts that the Legislature did not distinguish between the two types in adopting G.L. c. 164, § 43 (id. at 16, 20).

RMLD argues that analogous Massachusetts law in eminent domain taking cases confirms the propriety of severance damages and other jurisdictions recognize economic severance damages (id. at 17, citing Southern Calif. Edison v. Railroad Commission of California, 17 PUR (NS) 311, 325 (Cal. Supreme Court 1936); Fresno v. San Joaquin Light and Power Corp., 19 PUR (NS) 73, 84-85 (California Railroad Commission (1936))). RMLD also argues that as a matter of law, exclusion of power supply-related damages conflicts with the underlying purpose of G.L. c. 164, § 43 (id. at 4, 29). RMLD asserts that legislative policy

supports long-term power purchases and the statute's purpose is to afford fair compensation, which is equitable to both the ratepayers of the selling system and the buying system id. at 3, 5, 20, 24, 29). RMLD maintains that exclusion of these costs would cause substantial harm to the selling system's remaining ratepayers (id. at 4, 29). RMLD also maintains that due to the risks involved, municipal electric departments serving adjoining towns would no longer enter into immediate or long-term power purchases based upon system least-cost planning criteria and would be forced to impose geographically differentiated and marginal cost rates and/or large termination penalties as a means of protecting its ratepayers id. at 4-5, 37).

3. MMWEC

MMWEC argues that contract liabilities are compensable as severance damages pursuant to G.L. c. 164, § 43 (MMWEC Brief at 2-3, 6). MMWEC contends that wording of the statute demonstrates that the Legislature did not intend to limit severance damages to physical damages (id. at 2-3). MMWEC argues that the statute expressly states that the property to be considered in the purchase must be examined in light of the public interest id.). Thus, MMWEC advocates a public interest standard in resolving the issues presented in the petition id. at 3).

MMWEC argues that the public interest requires inclusion of contract liabilities id.). MMWEC contends that important public interests exist in enforcing contracts and safeguarding public financing (id. at 3-4). MMWEC also contends that its essential

public function, as established by the Legislature, would be placed in jeopardy if the Department were to determine that Stow has no obligations with respect to Hudson's contracts^{id.} at 4). In addition, MMWEC argues that principles of equity and fairness require compensation for contract obligations incurred in reliance on another town's commitment to obtain service (^{id.} at 5-6).

B. ANALYSIS AND FINDINGS

The issue presented is whether severance damages, as that term is used in G.L. c. 164, § 43, and incorporated by reference into St. 1898, c. 143, include consequential and economic damages relating to wholesale purchase power contracts and other contractual relationships relating to the ownership or purchase of electric generation. At this time, the Department is not prepared to make a conclusive determination in this advisory ruling that severance damages, as a matter of law, either do or do not include such liabilities for the following reasons.

First, there is no Massachusetts case law which directly addresses severance damages as that term is used in G.L. c. 164, § 43. In addition, related Massachusetts case law is not dispositive on this issue.

Second, other jurisdictions differ as to whether this type of damages is compensable. For instance, the Louisiana court in Red River Waterway Commission v. Fry recognized business or economic damages as a compensable element of severance damages in an eminent domain matter. Red River Waterway Commission v. Fry

628, 642 So.2d 38 (1993). Similarly, California recognizes two types of severance damages, physical and business severance damages. See Sacramento Utility District 48 PUR (NS) 321, 333-334 (Cal PUC 1942) ; Fresno v San Joaquin Light & Power Corp. 19 PUR (NS) 73, 84-84 (Calif. Railroad Commission 1936). In Iowa, generation and transmission capacity dedicated to customer is also compensable, but it must be demonstrated that excess capacity will exist before compensation will be awarded. See City of Sheldon, Iowa v. Iowa Public Service Company Docket No. SPU-88-7 at 482, 492-94 (1990).

On the other hand, the court in Arizona Water Company v. City of Yuma held that penalties on bonds payable upon condemnation were not compensable. Arizona Water Company v. City of Yuma, 7 Ariz.App. 53, 58 (1968). The court reasoned that the city was not a party to the indenture agreement and the city did not proximately cause the damage. Id. at 58-59. The court also rejected a claim for loss of income during the reinvestment period. Id. at 53, 58. The court based its decision on the fact that the damages were too remote and speculative. Id. In Alabama Power Company v. Alabama Public Service Commission the court also espoused that damages must be direct and certain, not remote and speculative, to be compensable. Alabama Power Company v. Alabama Public Service Commission 24 PUR 3d 309, 313 (1958).

Despite the absence of any controlling case law, it is our opinion, based on our current interpretation of G.L. c. 164, § 43, that there is some possibility that severance damages could

include those damages associated with wholesale purchase power contracts and other contractual relationships relating to the ownership or purchase of electric generation. However, because this is a case of first impression, the Department determines that this case, or any other case involving this issue, must be litigated fully before the Department can enunciate a final position on severance damages, as that term is used in G.L. c. 164, § 43. A complete record containing analysis, possibly including expert testimony, and further argument, is necessary to ensure a proper determination of whether contract liabilities are compensable as severance damages as a matter of law, and, if so, whether all or any portion of the damages are compensable as severance damages. While here the Department cannot provide a standard under which it would determine the amount of contract damages which may be compensable as severance damages, it is likely that the Department would focus a significant portion of its review on whether the alleged contract damages are direct and certain.

IV. ADVISORY RULING

Accordingly, after due consideration of the stated facts and the foregoing analysis, the Department hereby rules as follows:

The Department cannot at this time make a conclusive determination that severance damages, as used in G.L. c. 164, § 43, either do or do not include consequential and economic damages relating to wholesale purchase power contracts and other contractual relationships pertaining to the ownership or purchase

of electrical generation. Because the foregoing ruling is based upon the specific facts set forth in Stow's petition of June 30, 1993, this ruling is limited to the situation presented by Stow, and has no precedential value. Different facts or conditions could result in different opinions.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner